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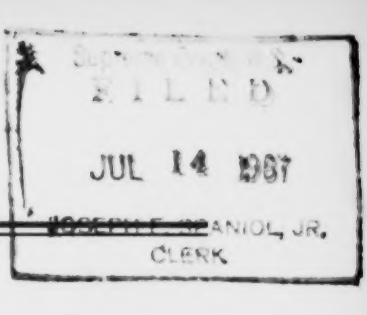


No. 87-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**ANR GASIFICATION PROPERTIES COMPANY, As a Partner of Great Plains Gasification Associates,**

*Petitioner,*

*v.*

**UNITED STATES OF AMERICA and BERTON J. ROTH, As Substitute Trustee Under the Mortgage Dated January 15, 1982, With Great Plains Gasification Associates,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED

Whether, contrary to *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and decisions of other courts of appeals, private parties that have borrowed federal funds to construct a $2 billion alternative energy plant may be denied their state law rights of redemption in a foreclosure action when:

(a) the federal statute authorizing the loan does not address or displace rights of redemption;

(b) there is no need for a uniform national redemption rule; and

(c) recognition of state law rights of redemption would not frustrate any purpose of the federal statute?

## PARTIES BELOW

In the proceedings in the court of appeals, plaintiffs and appellees were: the United States of America and Berton J. Roth, as substitute trustee under the Mortgage dated January 15, 1982, with Great Plains Gasification Associates. The State of North Dakota, ex rel. Nicholas J. Spaeth, Attorney General of North Dakota, intervened in support of appellees in the court of appeals. Defendant and appellant below was: ANR Gasification Properties Company, as a partner of Great Plains Gasification Associates.

## STATEMENT REQUIRED BY RULE 28.1

Petitioner, ANR Gasification Properties Company, is a wholly-owned subsidiary of The Coastal Corporation. In addition to its other wholly-owned subsidiaries, The Coastal Corporation has, directly or through wholly-owned subsidiaries, an ownership interest in Colorado Interstate Gas Company and ANR Pipeline Company.

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix to Petition for Certiorari ("App.") 1A-8A) is reported at 813 F.2d 193. The opinion of the United States District Court for the District of North Dakota (App. 11A-30A) is unreported.

### JURISDICTION

The opinion and judgment of the court of appeals were entered on March 11, 1987. (App. 2A.) The court of appeals denied petitioner's timely petition for rehearing on April 16, 1987. (App. 10A.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The following provisions of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901 *et seq.*, are pertinent to this petition:

Section 3, 42 U.S.C. § 5902:

"(a) It is the policy of the Congress to develop on an urgent basis the technological capabilities to support the broadest range of energy policy options through conservation and use of domestic resources by socially and environmentally acceptable means.

(b)(1) The Congress declares the purpose of this chapter to be to establish and vigorously conduct a comprehensive, national program of basic and applied research and development, including but not limited to demonstrations of practical applications, of all potentially beneficial energy sources and utilization technologies, within the Department of Energy."

Section 19(a), 42 U.S.C. § 5919(a):

"It is the purpose of this section—

(1) to assure adequate Federal support to foster a demonstration program to produce alternative fuels from coal, oil shale, biomass, and other domestic resources;

(2) to authorize assistance, through loan guarantees under subsection (b) and (y) of this section for construction and startup and related costs, to demonstration facilities for the conversion of domestic coal, oil shale, biomass, and other domestic resources into alternative fuels; and

(3) to gather information about the technological, economic, environmental, and social costs, benefits, and impacts of such demonstration facilities."

Section 19(g)(2), 42 U.S.C. § 5919(g)(2):

"If the Secretary makes a payment under paragraph (1) of this subsection [providing for payment by the Secretary should a borrower default], the Secretary shall be subrogated

to the rights of the recipient of such payment (and such subrogation shall be expressly set forth in the guarantee or related agreements), including the authority to complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements, or any other property of the borrower (of a value equal to the amount of such payment) to the extent that the guarantee applies to amounts in excess of the estimated project cost under subsection (c)(2)(B) of this section, without regard to the provisions of the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C. 471 *et seq.*] . . . or any other law, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property."

## STATEMENT OF THE CASE[1]

This case involves the future of a $2 billion coal gasification plant that was built with $536 million of private funds and $1.5 billion in federally-guaranteed loans. This plant represents the nation's first successful effort to produce synthetic natural gas on a large scale.

A premise of this extraordinary project was that, in the event that falling energy prices led to default and foreclosure, the private participants would have a one-year period after foreclosure in which to "redeem" the project and attempt to restructure their loan obligations, consistent with applicable state commercial law. However, the Eighth Circuit has specifically denied petitioner these redemption rights and destroyed hundreds of millions of dollars in private investment—on the theory that private rights of redemption could be, and were, impliedly displaced by a

[1]In this petition, citations to "R. ___" are to the Joint Appendix that was filed in the court of appeals in Nos. 86-5225-ND and 86-5240-ND; citations to "S. ___" are to the Supplemental Appendix in No. 86-5256-ND.

federal statute. This holding conflicts with *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and with decisions of other courts of appeals. *See Chicago Title Insurance Co.* v. *Sherred Village Associates*, 708 F.2d 804 (1st Cir. 1983); *United States* v. *Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3d Cir. 1986); *United States* v. *Ellis*, 714 F.2d 953 (9th Cir. 1983).

**Background.** Petitioner, ANR Gasification Properties Company, is a wholly-owned subsidiary of American Natural Resources Company, and is a partner in Great Plains Gasification Associates ("Great Plains"). Great Plains is a partnership of five energy companies that was formed to construct and operate a project of critical national importance—the nation's first large scale synthetic fuels plant.[2] The Great Plains Coal Gasification Plant was completed in 1984. Since then, the plant has been producing pipeline quality natural gas through "coal gasification"—a process that converts lignite coal into synthetic natural gas.

This extraordinary undertaking was conceived of and planned by American Natural Resources Company and its affiliates (collectively referred to as "ANR") over a period spanning three decades. Planning for the project commenced in the late 1960s, when ANR first realized the commercial potential of coal gasification and acquired a site for the plant.[3] The planning

[2]In addition to ANR Gasification Properties Company, the partners of Great Plains are: Tenneco SNG Inc. (a wholly-owned, indirect subsidiary of Tenneco Inc.); Transco Coal Gas Company (a wholly-owned subsidiary of Transco Energy Company); MCN Coal Gasification Company (a wholly-owned subsidiary of MidCon Corporation); and Pacific Synthetic Fuel Company (a wholly-owned subsidiary of Pacific Lighting Corporation). (R. 614.) Columbia Coal Gasification Corporation was one of the original partners of Great Plains, but withdrew from the partnership in 1980. In 1982, Pacific Lighting Corporation acquired an interest in the partnership. (R. 781-82.)

[3]In 1970, a plant site was acquired, rights to lignite and water in nearby locales were purchased, and preliminary engineering, testing,

*(Footnote continued on following page)*

accelerated in the early 1970s, after the Arab Oil Embargo demonstrated the paramount national need to develop alternative energy sources. It continued through the late 1970s, when ANR, with great effort, obtained the required federal regulatory approval.[4] In 1978, ANR received the necessary commitments of the other Great Plains partners to the project.[5] Finally, in 1982, financing for the project was obtained through a commitment from the Department of Energy ("DOE") to guarantee up to $2.02 billion in loans from the Federal Financing Bank, which is the federal agency that actually disperses funds for such projects.

These loan guarantees were made under the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C.

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*(Footnote continued from previous page)*
and environmental work was initiated. (S. 101.) By March 1975, the applications necessary to proceed with the project had been filed with the Federal Power Commission (now called the Federal Energy Regulatory Commission or "FERC"). *See Great Plains Gasification Associates*, 9 FERC ¶ 61,221 at 61,399 (1979).

[4]The United States Court of Appeals for the District of Columbia Circuit set aside FERC's initial orders authorizing the project. *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132 (D.C. Cir. 1980). Following negotiations with the other parties to the FERC proceedings, in early 1981, Great Plains filed an offer of settlement with FERC. FERC subsequently issued an order which approved the offer of settlement. *Great Plains Gasification Associates*, 15 FERC ¶ 61,106, *amended*, 16 FERC ¶ 61,121 (1981).

[5]As a way of assuring the financial viability of this experimental project, in 1982, Great Plains entered into Gas Purchase Agreements with pipeline companies affiliated with four of the partners (the "Pipeline Affiliates"), obligating the Pipeline Affiliates to purchase allotted percentages of the plant's contractually stipulated capacity at prices expected to be above then prevailing market prices for natural gas. (R. 133, 151.) The Pipeline Affiliates are: ANR Pipeline Company (an affiliate of petitioner ANR Gasification Properties Company); Natural Gas Pipeline Company of America (an affiliate of MCN Coal Gasification Company); Tennessee Gas Pipeline Company (an affiliate of Tenneco SNG Inc.); and Transcontinental Gas Pipe Line Corporation (an affiliate of Transco Coal Gas Company). (R. 615.)

§§ 5901 *et seq.* ("NERDA"). NERDA, too, was enacted in the aftermath of the Arab Oil Embargo. NERDA is designed to foster the development of alternative energy sources. It authorizes federal loan guarantees to support experimental projects that produce information about the "technological, economic, environmental, and social costs, benefits, and impacts" of coal gasification facilities. 42 U.S.C. § 5919(a)(3). The plant involved in this case epitomizes the type of project NERDA was enacted to support. As DOE told Congress in 1985, "[t]he [Great Plains] Project is now providing very valuable technical, environmental, and socioeconomic information. This is the policy reason the Project was provided federal assistance." (R. 779.)

When they undertook this bold experiment, both DOE and the Great Plains partners knew that its future was uncertain and would be subject to unpredictable fluctuations in world energy prices. This uncertainty led DOE and the private parties to agree on measures designed to limit the financial exposure of the private parties.[6]

In addition, the parties knew that North Dakota law provides two separate protections for debtors in the event of default and foreclosure. First, one North Dakota statute (N.D. Cent. Code § 28-24-11) entitles the debtor to possession of the property after default and throughout any redemption period. A second and separate North Dakota statute (N.D. Cent. Code § 32-19-18) entitles the debtor to redeem the property within one year of foreclosure on a mortgage-backed loan.[7] Here, the mortgage

[6]In agreements executed by the partners and DOE, the partners agreed with DOE that their obligation to contribute funds to the project was subject to their right to terminate their participation in the project if they came to believe that it would not achieve certain financial results. In the event the partners exercised this right, DOE was expected to foreclose on the mortgage securing the guaranteed loan, but the partners' liability would be limited to the amount of equity they had already invested in the project. (R. 83, 363-65.)

[7]The redemption statute provides that "[a]ll real property sold upon foreclosure of a mortgage . . . may be redeemed at any time within one year after such sale . . . ." N.D. Cent. Code § 32-19-18.

agreement contains boilerplate language that provides for waiver of redemptive rights *only* to the extent that the borrower could legally waive them.[8] However, under North Dakota law, the redemptive rights created by North Dakota statute may not be waived. *See Smith* v. *Grilk*, 64 N.D. 163, 250 N.W. 787 (1933); *Fargo Building & Loan Association* v. *Rice*, 66 N.D. 100, 262 N.W. 345 (1935). Thus, as the Assistant Secretary of DOE testified to Congress in 1985 (after the project encountered financial difficulties), a premise of DOE's loan guarantee was that this latter provision of local law is applicable and that the Great Plains partners enjoy an unwaivable right of redemption (R. 795):

> "[I]n the event of foreclosure, Great Plains] would be entitled to a one-year redemption period and would be entitled to possession of the real property, and to the profits thereof, during that time. It is important to note that although [Great Plains] might voluntarily waive these rights, under North Dakota law, all contracts in restraint of the right of redemption are void and unenforceable."

**Default.** After execution of the Loan Guarantee Agreement, construction of the project was completed on schedule and without cost overruns. (R. 779; S. 102.) Deliveries of synthetic natural gas commenced from the first of two production facilities on July 28, 1984.

However, even before the plant became operational, substantial declines in energy prices made it essential that Great Plains restructure its financial obligations. (R. 782.) Therefore, in mid-1983, the partners began negotiations with DOE and the United States Synthetic Fuels Corporation ("SFC") to obtain financial support for the project and to restructure its loan obligations. (R. 782.) Following lengthy negotiations, on April 26, 1984, DOE, SFC, and Great Plains executed a Letter of Intent to

[8]Section 13.03 of the mortgage provides that (R. 118-19):

> "*To the full extent it may legally do so*, Borrower hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage . . ." (emphasis supplied).

provide a Price Guarantee Commitment to Great Plains of up to $790 million, which was subsequently reduced to $720 million. However, the final commitment was subject to approval by DOE, and the Secretary of Energy took no action for 15 months. (R. 768-69, 782.) By the end of June 1985, it had become clear to all parties that if this letter of intent were not approved by the Secretary, the project could not, as its debt was then structured, generate sufficient cash to make payments of interest and principal as they came due.

On July 30, 1985, the Secretary of Energy rejected the financial support proposal. (R. 769.) Great Plains then exercised its right to terminate its participation in the project (*see* p. 6 n. 6, *supra*) and defaulted on its loan. In its capacity as guarantor, DOE proceeded to make the interest and principal payments and thereupon became subrogated to the rights of the Federal Financing Bank under Section 19 of NERDA.

At the same time, three of the Pipeline Affiliates (but *not* ANR) urged that their commitments to purchase Great Plains' gas under the Gas Purchase Agreements (*see* p. 5 n. 5, *supra*) had also been terminated. At DOE's direction, however, the project continued in operation. (R. 599-600.)

Based upon its projections that the plant could become economical, on April 4, 1986, ANR made a formal proposal to DOE to establish a broad-based consortium to restructure the loan obligations, to inject new equity into the project, and thus to assure the project's long-term future. (S. 94-131.) It was rejected. ANR, together with another partner of Great Plains, submitted a second proposal on June 24, 1986. It too was rejected. Despite these setbacks, ANR remains committed to the project and to the objectives of NERDA. Because the Gas Purchase Agreements have subsequently been held to be enforceable[9], ANR remains

[9]On May 19, 1987, in appeals, Nos. 86-5225-ND and 86-5240-ND,
*(Footnote continued on following page)*

optimistic that the project's debt could be restructured, and the private investment preserved, if and when Great Plains' redemption rights are recognized.

**District Court Proceedings**. On August 29, 1985, the United States instituted this action, invoking the district court's jurisdiction under 28 U.S.C. § 1345, seeking, *inter alia*, foreclosure on the federal mortgage. The United States thereupon repudiated DOE's prior position and its prior representations to Congress by urging that the Great Plains partners should be denied any state law right of redemption after foreclosure. The United States asserted that Section 19 of NERDA precluded any such redemption rights. Section 19 provides that, upon default, DOE became subrogated to all the rights of the mortgagee Federal Financing Bank, including its rights to manage and operate the "property of the borrower"; it also makes DOE's rights superior to "the rights of any other person."[10]

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*(Footnote continued from previous page)*
the United States Court of Appeals for the Eighth Circuit affirmed the district court's holding that the Gas Purchase Agreements are valid and enforceable. Prior to this decision, uncertainties about the validity of the Gas Purchase Agreements prevented ANR from ascertaining the true value of the project and contributed to ANR's inability to formulate an acceptable restructuring plan.

[10]Section 19(g)(2) provides as follows (42 U.S.C. § 5919(g)(2)):

> "If the Secretary makes a payment under paragraph (1) of this subsection [providing for payment by the Secretary should a borrower default], the Secretary shall be subrogated to the rights of the recipient of such payment (and such subrogation shall be expressly set forth in the guarantee or related agreements), including the authority to complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements, or any other property of the borrower (of a value equal to the amount of such payment) to the extent that the guarantee applies to amounts in excess of the estimated project cost under subsection (c)(2)(B) of this section, without regard to the provisions of the Federal Property and Administrative Services Act

*(Footnote continued on following page)*

In response, Great Plains argued that the subrogation provisions of Section 19 merely gave DOE rights in the borrower's property that are superior to persons *other than* the borrower and that Section 19 did not, under any view, preclude the existence of rights of redemption after default and foreclosure. Great Plains further argued that, under *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the provisions of North Dakota law that establish a nonwaivable right of redemption had to be adopted as the federal rule of decision under NERDA.[11]

On January 14, 1986, the district court granted the government's motion for summary judgment. However, the district court rejected the government's argument that NERDA explicitly or impliedly precluded the continued existence of debtors' rights of redemption. The district court agreed with Great Plains that the subrogation provision of Section 19 of NERDA did not extinguish any state law rights of the borrower. Instead, it "simply defin[ed] the Secretary's authority to manage secured property upon the borrower's default, [and did not define] the rights of the parties to the mortgage *vis a vis* each other." (App. 21A.)

Because there was no specific congressional directive concerning redemption, the district court then applied the other criteria

*(Footnote continued from previous page)*

> of 1949, as amended [40 U.S.C. 471 *et seq.*] . . . or any other law, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property."

[11]ANR also urged the district court to withhold summary judgment on the foreclosure issue until after the validity of the Gas Purchase Agreements had been determined, pointing out that it remained committed to the project and that delaying foreclosure would facilitate restructuring the project's debt. Despite the possibility that the project could be saved if action on the foreclosure issue were postponed, the district court decided the validity and foreclosure issues simultaneously.

of *Kimbell Foods* to determine whether a uniform federal rule was required or whether it should apply North Dakota law to decide the issue. The court found "little need" for a uniform body of national law. (App. 23A.) However, the district court speculated that "application of state law might be considered to 'frustrate specific objectives of federal programs,' *if* these objectives are considered to include federal operation of the project upon default." (App. 23A (emphasis supplied).) Apparently on this basis, the district court held that the rights of redemption under North Dakota law would be extinguished upon foreclosure.

The foreclosure sale occurred on June 30, 1986, with the United States (the sole bidder) purchasing the project for $1 billion. In permitting the sale to proceed, the district court reaffirmed that Great Plains had no right of redemption. (App. 41A.)

**The Eighth Circuit's Decision**. The United States Court of Appeals for the Eighth Circuit affirmed, but without applying the criteria of *United States* v. *Kimbell Foods*. The Eighth Circuit acknowledged that "Congress has not explicitly dealt with redemption rights" in NERDA. However, the Eighth Circuit held that NERDA "provide[s] sufficient direction" to make the *Kimbell Foods* test inapplicable and to preclude redemption after foreclosure. (App. 7A.) The Eighth Circuit reasoned that Section 19 of NERDA—which subrogates DOE to the mortgagor's rights upon default, "including the authority to complete, maintain, operate, lease, or otherwise dispose of any property"—is inconsistent with, and thus supersedes, the North Dakota statute (N.D. Cent. Code § 28-24-11) that entitles the borrower to *possession* of the property for one year following *foreclosure*. Although the right of redemption is conferred by a separate North Dakota statute (N.D. Cent. Code § 32-19-18) and does not presuppose that the debtor be in possession, the Eighth Circuit concluded (without further explanation) that because the borrower's right of *possession* after *default* was impliedly

extinguished by Section 19 of NERDA, the separate right of *redemption* after *foreclosure* also was extinguished.

The necessary implication of the Eighth Circuit's reasoning is that there could also be no redemption after *default*. However, the Eighth Circuit held that the petitioners "could have redeemed anytime [after default and] prior to the [foreclosure] sale" (App. 8A)—which is an acknowledgment that the rights DOE acquired upon default under Section 19 of NERDA are not inconsistent with a subsequent right of redemption. The Eighth Circuit made no attempt to resolve this inconsistency other than to cite its earlier holdings that interests of the United States in its lending programs require a general federal rule that "a defaulting debtor's right of redemption is terminated by the foreclosure sale." (App. 8A, *citing United States* v. *Victory Highway Village, Inc.*, 662 F.2d 488 (8th Cir. 1981).)

## REASONS FOR GRANTING THE WRIT

In this case, the Eighth Circuit did more than destroy over $500 million of private investment in an energy project of great national importance. The Eighth Circuit's decision ignores the teachings of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and conflicts with decisions of the First, Third, Seventh, and Ninth Circuits that have correctly applied *Kimbell Foods* to other similar federal lending programs. These decisions reject the Eighth Circuit's holdings that there is a general "federal interest in protecting the funds of the United States and in securing federal investments" in lending programs and that this interest overrides nondiscriminatory state commercial laws upon which borrowers and creditors rely. *United States* v. *Victory Highway Village, Inc.*, *supra*, 662 F.2d at 497-98; *see* App. 8A.

*Kimbell Foods* recognizes that federal law governs the rights and duties of the United States under federal lending programs. 440 U.S. at 726. However, the Court held that these programs "do not inevitably require resort to uniform federal rules." *Id.* at

727-28. To the contrary, the Court held that generally applicable state commercial laws should not be displaced without "careful legislative deliberation" and a clear congressional statement. *Id.* at 739-40. The Court established a presumption that the rights and duties of participants in federal lending programs should be determined by "adopting" the pertinent state commercial law as the federal rule of decision. The Court held "that, absent a congressional directive, [the rights and duties] arising from these Government lending programs [are] to be determined under non-discriminatory state laws." *Id.* at 740.

Under *Kimbell Foods*, the choice of law inquiry has two levels. The initial inquiry is whether the Act of Congress has itself prescribed or required a specific uniform federal rule of decision. If it has, the inquiry is at an end. If the Act of Congress is silent on the question, then state law must be applied, unless there is a clear indication that the federal program, by its nature, requires a uniform national rule or that application of the particular state law would frustrate the objective of the pertinent federal statute. *Id.* at 728-29.

The Eighth Circuit, however, has generally taken the opposite position, holding that the "presumption expressed in *Kimbell* [is] in favor of federal law when a federal creditor's rights are at stake." *United States* v. *Landmark Park & Associates*, 795 F.2d 683, 685 (8th Cir. 1986).[12] In this case, the Eighth Circuit thus applied a federal rule that displaced state law without applying the *Kimbell Foods* factors, notwithstanding the Eighth Circuit's acknowledgment that Congress did not "specifically mention[] a right of redemption" in NERDA (App. 6A) and the undisputed fact that DOE had administered the program on the premise that state law rights of redemption *would* apply. *See* p. 7, *supra.* The

[12] *Accord*, *United States* v. *Missouri Farmers Association*, 764 F.2d 488 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1281 (1986); *United States* v. *Victory Highway Village, Inc.*, 662 F.2d 488 (8th Cir. 1981); *Victory Highway Village, Inc.* v. *Weaver*, 634 F.2d 1099 (8th Cir. 1980).

Eighth Circuit also did not deny that, as the district court found (App. 23A), a uniform federal rule is not required to administer NERDA. However, the Eighth Circuit held that the *Kimbell Foods* factors were inapplicable because a congressional intent to displace state law rights of redemption could somehow be inferred from Section 19 of NERDA. *Kimbell Foods* forecloses any notion that this statute could constitute "a congressional directive" to displace state law rights of redemption. 440 U.S. at 740.

Section 19 of NERDA merely states that DOE (as guarantor of a loan) will become subrogated to the federal mortgagee's rights in the "property of the borrower" upon default and that DOE's rights are superior to those of any "*other* person"—that is, any person other than the borrower. 42 U.S.C. § 5919(g) (emphasis supplied.) Thus, on its face, Section 19 does not affect the rights of the federal borrower; it merely gives DOE priority over other creditors of the borrower.

More fundamentally, Section 19 of NERDA could not displace a mortgagor's state law right of redemption, even under the Eighth Circuit's construction. The basis for the Eighth Circuit's holding is its conclusion that Section 19 gives DOE the right to take possession of and operate a federal energy project upon default and that "[i]f Great Plains were allowed to maintain *possession* of the plant for up to a year after the foreclosure sale," then "DOE could not exercise its right to operate the plant." (App. 7A (emphasis supplied).)[13] However, whether there is a right of redemption is entirely separate from the question of who has possession of the property before it is redeemed, and the exercise of a right of redemption in no way presupposes that the borrower has possession of the plant. Thus, the mortgagor's right of

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[13]Although the district court applied the *Kimbell Foods* criteria, the district court, too, appeared to rest its decision on the ground that the default debtor's continued *possession* of the property could interfere with federal operation of the program upon default. (App. 23A.)

redemption is conferred by a different state statute (N.D. Cent. Code § 32-19-18) than confers the right of possession (*id.* § 28-24-11).

Indeed, the Eighth Circuit's own holding demonstrates that there is no inconsistency between the Section 19 rights that DOE acquired as a subrogee upon default and the existence of a subsequent right of redemption in the mortgagor. The Eighth Circuit held that borrowers have a right of redemption *after* default and *after* DOE takes possession of the project under Section 19 of NERDA. (App. 8A.) Because Section 19 only defines DOE's possessory rights upon default, there is nothing in Section 19 that could support the Eighth Circuit's holding that a borrower has a right of redemption after default and up to the date of the foreclosure sale, but not thereafter.

The basis for this holding, rather, is the Eighth Circuit's earlier decisions that there is "an overriding federal interest in protecting the funds of the United States and in securing federal investments" and that a federal debtor's right of "redemption [must be] terminated by foreclosure and sale" in order to give the United States maximum latitude to recover moneys loaned under the federal program. *United States* v. *Victory Highway Village, Inc.*, 662 F.2d 488, 497-98 (8th Cir. 1981)(citation omitted); *see* App. 8A; *see also United States* v. *Landmark Park & Associates*, 795 F.2d 683, 686 (8th Cir. 1986); *United States* v. *Missouri Farmers Association*, 764 F.2d 488 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1281 (1986); *Victory Highway Village, Inc.* v. *Weaver*, 634 F.2d 1099, 1101 (8th Cir. 1980). However, *Kimbell Foods* is totally inconsistent with the Eighth Circuit's position. *Kimbell Foods* holds that the federal interest in such money lending programs does not require special "protective measures against defaulting debtors" and that there is no basis to fashion federal "rules that immunize the United States from the commercial law governing all other voluntary secured creditors" when, as here, the terms or purposes of the federal statute do not so require. 440 U.S. at 734.

The Eighth Circuit's decision similarly conflicts with the decisions of the First, Third, Seventh and Ninth Circuits. Each has held that state law cannot be displaced in the absence of an explicit congressional directive.

For example, in *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 708 F.2d 804 (1st Cir. 1983), the First Circuit addressed the issue of whether state law should govern the relative priority of a state mechanics lien and a federal mortgage insured by the Department of Housing and Urban Development ("HUD"). HUD argued that provisions of the pertinent statute and HUD regulations that limit HUD to insuring only mortgages that comprise "first liens" on property is a congressional directive that federal mortgages have priority over other liens, notwithstanding the applicable state priority rules. 708 F.2d at 807. In sharp contrast to the Eighth Circuit, the First Circuit refused to infer an intent to displace state law even from these provisions because, as here, there was no necessary inconsistency between the state priority rule and the express provisions of the federal statute. The First Circuit reasoned that it must adopt state law because Congress had not "*explicitly* mandated a federal rule of priority." *Id.* at 809 (emphasis supplied).

Similarly, in *United States* v. *Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3d Cir. 1986), the Third Circuit considered whether or not state law should determine the status of a lien on collateral for a Farmers Home Administration loan and refused to give effect to a federal regulation that, on its face, appeared to direct a specific federal rule of decision and to displace any contrary state rule. In contrast to the Eighth Circuit, the Third Circuit held that there must be an "*explicit* 'congressional directive' " (800 F.2d at 1239 (emphasis supplied)), and cited examples of statutes in which—unlike NERDA—Congress had expressly displaced the pertinent body of state law with the requisite specificity. *Id.*

The Courts of Appeals for the Seventh and Ninth Circuits also have refused to allow Government lending agencies to avoid state law on the basis of statutory provisions that do not unambiguously displace state rules of decision. In *Federal Deposit Insurance Corporation* v. *Braemoor Associates*, 686 F.2d 550, 554 (7th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983), the Seventh Circuit required "*explicit*" statutory direction to displace state law (emphasis supplied). Similarly, in *United States* v. *Pastos*, 781 F.2d 747, 751 (9th Cir. 1986), the Ninth Circuit refused to infer that Congress had, "by implication," directed it to displace state law.[14]

In *United States* v. *Ellis*, 714 F.2d 953 (9th Cir. 1983), the Ninth Circuit refused to permit federal mortgagors to waive state law rights of redemption, holding that a congressional "directive" to displace state law could not be inferred from a congressional directive to maintain credit funds at reasonable rates. *Id.* at 955. The Ninth Circuit explained at length that rights of redemption protect such significant debtor interests that Congress must be presumed to have adopted these provisions of the applicable state law in the absence of a clear and explicit congressional statement to the contrary. *Id.* at 956-57.

A final consideration favoring a grant of the petition for certiorari is the amount of private investment in this first-of-its-kind joint endeavor between government and private industry. There is now a consistent body of decisions in the Eighth Circuit that conflicts with *Kimbell Foods* and with the decisions of other courts of appeals.[15] If North Dakota were located in one of several other circuits, its redemption laws would be available to petitioner, and petitioner would have the second chance to save its investment that

[14]*See also United States* v. *Irby*, 618 F.2d 352 (5th Cir. 1980); *United States* v. *Dismuke*, 616 F.2d 755 (5th Cir. 1980).

[15]Indeed, this conflict among the circuits looms larger than in the normal case, because it cuts across a myriad of federal programs and potentially affects thousands of commercial creditors and debtors throughout

*(Footnote continued on following page)*

these laws allow. The financial stakes are too large, and the legal principles too important, to permit the outcome of this case to turn on such fortuities as the section of the country in which the issue happens to arise.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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*(Footnote continued from previous page)*
the Eighth Circuit. It means that creditors and debtors affected by a federal lending program, unlike similarly situated persons elsewhere, will not be able to rely upon well established local commercial law, but instead will be subject to the unpredictable application of "federal" commercial rules that, in fact, apply only in a single circuit.

# APPENDIX

# COURT OF APPEALS OPINION
# [MARCH 11, 1987]

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

**NO. 86-5256**

United States of America and Berton J. Roth, As Substitute Trustee Under the Mortgage Dated January 15, 1982, With Great Plains Gasification Associates,

Appellees,

State of North Dakota ex rel. Nicholas J. Spaeth, Attorney General of North Dakota,

Intervenor below,

v.

Great Plains Gasification Associates,

ANR Gasification Properties Company, As a Partner of Great Plains Gasification Associates,

Appellant,

MCN Coal Gasification Company, As a Partner of Great Plains Gasification Associates; Tenneco SNG Inc., As a Partner of Great Plains Gasification Associates; Transco Coal Gas Company, As a Partner of Great Plains Gasification Associates; Pacific Synthetic Fuel Company, As a Partner of Great Plains Gasification Associates; Natural Gas Pipeline Company of America; ANR Pipeline Company, Formerly Michigan Wisconsin Pipeline Company; Tennessee Gas Pipeline Company, and Transcontinental Gas Pipe Line Company,

Natural Gas Pipeline Co. of America,

v.

Federal Financing Bank.

Appeal from the United States District Court for the District of North Dakota.

Submitted: January 14, 1987
Filed: March 11, 1987

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and CAHILL*, District Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

*The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri, sitting by designation.

Appellant, ANR Gasification Properties Company, appeals from the district court's[1] order granting summary judgment in favor of the United States in this foreclosure action. For the reasons stated below we affirm the district court's order.

## I. BACKGROUND

ANR Gasification Properties Company (ANR) is one of five general partners in Great Plains Gasification Associates (Great Plains). The partnership was formed for the purpose of constructing, owning, and operating the Great Plains Coal Gasification Plant in North Dakota. The plant converts lignite coal into synthetic natural gas. The design, construction, and operation of the plant were delegated to ANG Coal Gasification Company (ANG), a subsidiary of ANR.

The project was financed by a loan from the Federal Financing Bank for approximately $1.5 billion. The Department of Energy (DOE) guaranteed the loan pursuant to the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. § 5901 *et seq.* (1982) (the Act). The loan was secured by a mortgage on virtually all partnership assets. Section 13.03 of the mortgage agreement provides that "[t]o the full extent it may legally do so, Borrower hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage * * *." Section 13.04 provides that the rights and obligations of the parties to the mortgage are to be governed by federal law.

In mid-1983, when decreasing oil prices threatened the viability of the project, Great Plains submitted a proposal, subject to DOE approval, whereby the existing loan obligations would be

[1]The Honorable Patrick A. Conmy, United States Chief District Judge for the District of North Dakota.

restructured and an additional $720 million would be loaned. On June 30, 1985, while the proposal was pending, Great Plains failed to make its $70,338,753.90 interest payment and $328,500,000 principal payment. A standstill agreement was entered, extending the due date until August 1, 1985, so that restructuring alternatives could be pursued. On July 30, 1985, the DOE rejected Great Plains' proposal and on August 1 the partners exercised their right to terminate their participation in the project. The DOE directed the project administrator, ANG, to continue operating the plant. On October 9, 1985, the loan was accelerated and DOE paid the Federal Financing Bank the entire amount due, thereby becoming subrogated to the bank's rights against Great Plains.

Shortly after default the government filed suit against Great Plains seeking foreclosure of the mortgage and sale of the mortgaged property. After acceleration of the note the government moved for summary judgment on these issues. Great Plains resisted the motion arguing that the foreclosure should be conducted in accordance with North Dakota law and consequently it should be allowed to redeem for up to one year after the foreclosure sale. The district court granted the government's motion holding that federal law, under which there is no right of redemption, is applicable. Prior to the foreclosure sale, scheduled for May 28, 1986, Great Plains moved to amend the court's order to defer the sale for six months in recognition of an equitable right of redemption. The district court denied the motion, and on June 30, 1986, the property was sold to the sole bidder, the United States, for $1 billion.

On appeal ANR argues that the district court erred in applying federal law rather than North Dakota law and in failing to grant an equitable right of redemption. We disagree.

## II. DISCUSSION

### A. Choice of Law

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), the Supreme Court stated that it "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." It is therefore axiomatic that if the Act provided for a right of redemption then ANR would be entitled to it. Likewise, if the Act explicitly denied such a right then none would exist. In this case, however, Congress has not spoken explicitly on the issue of redemption.

ANR argues that because of the absence of explicit language on redemption we must look to the balancing test of *Kimbell Foods* to determine the appropriate rule of decision. In *Kimbell Foods* the issue was whether, in the absence of specific congressional directions, state law or federal common law should govern lien priorities. The court balanced three interests in determining that state law was the appropriate federal rule of decision: whether there was a need for a nationally uniform body of law, whether application of state law would frustrate specific objectives of the federal program, and whether application of a federal rule would disrupt commercial relationships based on state law. *Id.* at 728-29.

ANR argues that the district court incorrectly weighed these factors when determining that federal law applies. We need not reach this issue because although Congress did not specifically address the issue of redemption, the Act does provide sufficient direction for a decision in this case. Since there is a congressional directive, *Kimbell Foods* is inapplicable.

Were we to reverse the district court and look to North Dakota law for our rule of decision Great Plains would have the right to redeem at any time up to one year after judicial sale. N.D. Cent.

Code § 32-19-18 (1976). During this period Great Plains would be entitled to the possession, rents, use, and benefit of the plant. N.D. Cent. Code § 28-24-11 (1974). Federal law, however, leads to a different result. Without specifically mentioning a right of redemption, Congress presupposed default and delineated the DOE's rights in the event of default. Section 5919(g) of the Act provides:

> (1) If there is a default by the borrower * * * the holder of the obligation [lender] shall have the right to demand payment of the unpaid amount from the Secretary * * *.
>
> (2) If the Secretary makes a payment under paragraph (1) of this subsection, the Secretary shall be subrogated to the rights of the recipient of such payment [lender] * * * including the authority to complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements, * * * without regard to the provisions of the Federal Property and Administrative Services Act of 1949, * * * or any other law, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property.
>
> * * *
>
> (4) * * * The guarantee agreement shall include such detailed terms and conditions as the Secretary deems appropriate to protect the interests of the United States in the case of default and to have available all the patents and technology necessary for any person selected, including, but not limited to the Secretary, to complete and operate the defaulting project. * * *

42 U.S.C. 5919(g). The regulations promulgated pursuant to the Act provide that upon default the secured party shall take actions reasonably necessary to preserve, protect, and maintain the collateral to enable the United States to achieve maximum recovery of the amount owed. 10 C.F.R. § 796.61(a)(2)(1986).

The district court held and ANR argues that these provisions merely define the DOE's right to manage the property upon default, rather than define the rights of the parties *vis a vis* each other. The government, on the other hand, argues that these provisions constitute sufficient congressional directives to make the *Kimbell Foods* test inapplicable. The Act gives the DOE authority to run the plant as well as provides that the DOE's rights shall be superior to those of any other person, the government argues.

We agree with the government because we find that the language of the Act would be rendered superfluous if North Dakota law were to apply. If Great Plains were allowed to maintain possession of the plant for up to a year after the foreclosure sale, the DOE could not exercise its right to operate the plant and thus the DOE's rights would be subservient to those of Great Plains. Granted, Congress has not explicitly dealt with redemption rights of loans guaranteed under the Act but it has provided the procedure to be followed upon default. Whereas under North Dakota law Great Plains, as debtor, would have certain superior rights to the property upon default, so the DOE, under the Act, has rights to the property which are superior to all others. Congress has the authority to determine priority rights arising under nationwide federal programs and in this case has granted superior rights to the United States.

Congress has also instructed the DOE to include in the guarantee agreement terms necessary to protect the interests of the United States. The DOE accomplished this by including a provision waiving any redemption rights. ANR argues that such clauses are void under North Dakota law but since we have already determined that state law is inapplicable, the clause is valid. See *United States v. Stadium Apartments, Inc.*, 425 F.2d 358, 362 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970).

**B. Equitable Right of Redemption**

ANR argues that assuming arguendo that North Dakota law is inapplicable, the district court erred in not granting an equitable right of redemption either before or after the foreclosure sale. We disagree. This court has held that under federal law a defaulting debtor's right of redemption is terminated by the foreclosure sale. No statutory right of redemption exists after the sale. *United States v. Victory Highway Village, Inc.*, 662 F.2d 488 (8th Cir. 1981). As to granting an equitable period of redemption before the sale, ANR concedes that the "terms and methods of judicial sale are largely in the discretion of the district judge directing the sale." *Revere Copper & Brass, Inc. v. Adriance Machine Works*, 68 F.2d 708, 709 (2d Cir. 1934). In light of the fact that the sale did not take place until June 30, 1986, one year after Great Plains initially failed to meet its obligations, we cannot say that the district court abused its discretion in not deferring the sale for an additional six months. ANR could have redeemed anytime prior to the sale and they have not shown any circumstances requiring an extension.

## III. CONCLUSION

Today we hold that the North Dakota redemption statute does not apply to the foreclosure of a loan guaranteed pursuant to the Federal Nonnuclear Research and Development Act of 1974. We also hold that the district court did not err when it refused to defer the foreclosure sale or recognize a redemption period after the sale. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

# COURT OF APPEALS ORDER DENYING REHEARING

## [APRIL 16, 1987]

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

NO. 86-5256-ND

United States of America, et al.,

Appellees,

vs.

ANR Gasification Properties Company, etc.,

Appellant.

Appeal from the United States District Court for the District of North Dakota

[April 16, 1987]

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

# DISTRICT COURT
# MEMORANDUM AND ORDER
# [JANUARY 14, 1986]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NORTH DAKOTA**
**SOUTHWESTERN DIVISION**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

vs.

GREAT PLAINS GASIFICATION ASSOCIATES, *et al.*,

Defendants,

and

NATURAL GAS PIPELINE COMPANY OF AMERICA,

Third-Party Plaintiff,

vs.

FEDERAL FINANCING BANK,

Third-Party Defendant.

Civil No. A1-85-237

[Filed Jan. 14, 1986]

**MEMORANDUM AND ORDER**

Plaintiffs have moved for summary judgment on all four counts of the complaint:

1. Foreclosure

2. Declaratory action regarding validity of gas purchase contract.

3. Injunctive relief requiring payments for gas at contract rates.

4. Money Judgment for unpaid "contract" rates on gas tendered to defendant Natural.

The motions are resisted.

## FACTS

GPGA, a partnership composed of: ANR Gasification Properties Co.; MCN Coal Gasification Co.; Pacific Synthetic Fuel Co.; Tenneco SNG Inc.; and Tranco Coal Gas Co., invested approximately $550,000,000.00 of its capital and $1,500,000,000.00 borrowed from the Federal Financing Bank (FFB) in the construction of a plant designed to produce "natural gas" from lignite coal deposits in North Dakota.

Four "pipeline" companies, Natural Gas Pipeline Co. of America; ANR Pipeline Co.; Tennessee Gas Pipeline Co.; and Transcontinental Gas Pipe Line Corp., entered into "take or pay" gas production contracts in various percentages of plant production which totalled 100%. These contracts obligated the pipeline companies to a payment rate substantially above market price for the gas produced, which price was to reduce in periodic increments over a 25-year period.

To secure repayment of the loan, the Partnership gave a mortgage to FFB and included as security the "subsidy" purchase prices included in the gas purchase contracts.

The Department of Energy of the United States guaranteed repayment of the loan to the FFB and entered in separate contracts with the "pipeline companies" defining the rights of the parties should the partnership default.

The security arrangements for the loan also provided for a trustee to assume possession and operation of the pledged assets in the event of default.

The "pipeline companies" were either affiliated or in common ownership with four of the five partners in the "partnership."

The financing arrangements were in substance:

1. The "partnership" limited its liability to the original investment.

2. To demonstrate a "cash flow" feasibility, the "subsidy rate" gas purchase contracts were signed, with the requirement that the "subsidy price" be spreadable and chargeable to the gas consumer customers of the pipeline companies.

3. The gas purchase contract rights were included in the security package given to the FFB and to the loan guarantor, the United States.

The plant was an experimental process. The gas produced, if any, would be produced at a price conceded to be higher than market price from other sources at time of initial production.

The impetus for construction and for the execution by the pipeline companies of the gas purchase contracts was the "crisis" in the mid-1970's created by OPEC. The project was part of a program supported by the United States to reduce dependence upon foreign supplies of fossil fuel energy.

The "assumptions" and "beliefs" behind the business judgment of the contracting parties were that the energy supplies available to the United States consumers would continue to be "squeezed" by foreign producers, that prices would continue to rise, that sources of natural gas would or might become unavailable to distribution companies and that, with these assumptions, the investment by way of the subsidy price structure during the early years of the plant operation was warranted through provision of a dependable supply source at a more favorable price during the later years of the initial 25-year period.

The predictions of future conditions turned out to be inaccurate.

The plant was constructed and it worked.

When the Department of Energy (DOE) refused an additional infusion of capital, the "partnership" announced that it could not meet the principal and interest payment due and "defaulted" on the mortgage obligation.

On August 1, 1985, the "partnership" relinquished control of the plant and its assets to the trustee.

During July and August of 1985, various officials of the DOE made public statements regarding the economic viability of the plant. These statements were made in justifying the refusal to inject additional capital and also after default had occurred. The gist of these statements can be summarized as:

> "The plant cannot be economically justified in view of market realities as opposed to initial market projections; it would be wrong to spend additional tax money to operate it; if we continue its operation at all, it will be for
>
> 1. a few days
> 2. a few months
> 3. until the summer of 1986
> 4. during the period income exceeds operating "expense."

After August 1, 1985, the plant continued in operation and gas was delivered to the pipeline companies. Three of the four have at times paid less than the contract price. The fourth pipeline company, ANR, has paid the contract price.

The contract rate is currently approximately 2½ times the market rate.

Under present Federal Energy Regulatory Commission (FERC) orders, the pipeline companies are authorized to spread the contract rate back to their customers.

The DOE exercised the right afforded the United States in the agreements between it and the pipeline companies to "reinstate" the gas purchase contracts and did so by notice dated August 21, 1985.

Considering the defenses raised by the defendant pipeline companies, the relevant contract provisions are:

GAS PURCHASE AGREEMENT

*ARTICLE XIX*
*ABANDONMENT*

1. Seller shall have the right, with the consent of the Secretary so long as the mortgage is in effect, to abandon its services hereunder at any time following the determination, made by the seller in its sole good faith judgment, that it is not feasible to continue such service for technological reasons, cost overruns in excess of estimate of costs of construction of the gasification plant or related facilities, government action, whether by legislation, regulation, amendment of authorizations or otherwise, law suits, force majeure including all causes or contingencies described in section 1 of article IX hereof, or any other reason, whether similar or dissimilar to those enumerated hereinabove.

*ARTICLE XVII*
*APPLICABLE LAW*

This agreement shall be governed by and be interpreted in accordance with the law of the State of Illinois.

*STATEMENT OF PURPOSE*

Whereas seller desires to demonstrate the feasibility of manufacturing synthetic gas from coal, and whereas, buyer desires to supplement and augment its reserves with a long term supply of gas by purchasing such gas for resale to its customers;

*ARTICLE XII*
*PAYMENT OBLIGATIONS*

> In return, Buyer *believes* it will be assured a long term supply of gas on equitable and reasonable terms and conditions. Further, it is recognized that buyer, in making its commitment to purchase such gas will rely upon (1) a finding by the FERC that buyers execution of this agreement is a prudent act and (2) advance assurances from the FERC that the charges hereunder may be reflected in Buyer's rates. Recognition of the foregoing by Buyer and Seller, therefore, constitutes the basis upon which Buyer is willing to commit to the purchase of the Gas and Seller is willing to proceed with the construction of the gasification plant. If, however, a subsequent action by the FERC should remove from the buyer the right to reflect any or all charges under this agreement, it is hereby agreed as follows:
> (a) Notwithstanding the provisions of Articles X and XI of this agreement, Buyer shall be obligated to make payments to seller in accordance with such articles only to the extent that the FERC allows buyer to charge the amounts described therein to its customers on a rolled-in basis pursuant to the purchased gas cost adjustment provision of Buyers FERC Gas tariff or on a substantially equivalent basis which provides for the charging of such amount.

One of the pipeline companies invoked the provisions of Section 2-609 of the U.C.C., "Right to adequate Assurance of Performance." The Department of Energy, in response, indicated that it would operate the plant so long as income exceeded cost of production.

It also appears that Illinois has adopted Section 2-609 of the U.C.C.

That the United States did not comply with the procedural requirements of the foreclosure statutes of the State of North Dakota and served no statutory "notice of foreclosure" prior to suit.

That the economic impact of plant closure upon the State of North Dakota and its citizens and the economic impact of the contract rates upon the pipeline company consumers are not proper matters for consideration by the court; rather, these matters may be appropriate for political or legislative action but not as a basis for contract construction.

That the motives of ANR in supporting contract validity are equally irrelevant.

The motion and objections relating to the foreclosure raise issues which must be separated into two categories. The first category creates a condition precedent to either the United States or the trustee having standing to prosecute the action.

Both GPGA and Pacific argue that plaintiff has not followed the steps set forth in the mortgage for substitution of a trustee, and that Berton J. Roth, the purported substitute trustee, is thus not lawfully in possession of the property, and by inference, lacks standing to appear as a plaintiff.

The filings show the following:

Exhibit "B" to document #177 (Roth Declaration)

a) Letter to Citibank, copied to Federal Financing Bank and GPGA, stating that the Secretary appointed Roth successor trustee under section 8.06 of the mortgage

b) Roth's acceptance of that appointment

c) Memo to Roth notifying him that DOE was appointed as successor trustee

d) DOE's acceptance of that appointment, and

e) A delegation of DOE's authority as successor trustee to Roth

The letter, (a) above, was sent to GPGA by First Class Mail and GPGA does not specifically deny its receipt. (*see* McKinney declaration, attachment to document #97)

GPGA argues (document #95 at page 4) as does Pacific (document #97) that notice was not received from Citibank that it had resigned or been removed as trustee.

Section 8.06 of the mortgage provides that the Secretary is to provide notice of removal to the trustee and to GPGA.

The record reveals that the required notice was given, and by the appropriate entity.

GPGA also argues that a supplemental indenture has not been executed in accordance with 9.02(b)(2) of the mortgage, and that such is required to authorize a successor trustee to act. The section is permissive—it states that GPGA may execute a supplemental indenture to evidence a succession in trusteeship. Nowhere does a requirement exist that such an act be done.

GPGA finally argues that under 10 C.F.R. § 796.60(f) "The guarantee agreement shall provide that, upon payment of the guaranteed loan by the Secretary, the holder shall transfer and assign to the Secretary, all rights held by the holder in the guaranteed loan . . . Upon such payment and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have the superior rights in and to the property acquired from the recipient of the payment."

Evidence is required that payment and transfer of rights of the FFB have occurred.

In response thereto, Plaintiff contends that Roth exhibit VI provides sufficient uncontroverted evidence of the subrogation status of the Secretary. The court agrees and finds no genuine issue of material fact present.

Roth is the duly acting trustee and in lawful possession of the plant.

Turning next to the issues raised on the foreclosure count itself, there is a conflict in authorities regarding the applicability of state law and procedures in effecting the remedy of foreclosure.

Both Plaintiff and GPGA cite *U.S. v. Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448 (1979) in support of their positions. *Kimbell Foods* addressed whether lien priority is to be determined under state or federal law when liens are held both by the Small Business Administration (SBA) or the Farmers Home Administration (FmHA) and by private parties. The Court first determined that federal law governs questions involving the rights of the United States arising under nationwide federal programs. Absent a congressional directive, whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interest and to the effects upon them of applying state law." *Id.*, 440 U.S. at 728, 99 S.Ct. at 1458. Those considerations include whether the nature of a federal program necessitates a nationally uniform body of law, whether application of state law would frustrate specific objectives of the federal program, and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

Plaintiff first argues that the balancing test outline in *Kimbell Foods* need not be applied because the statute under which the loan guarantee was made, 42 U.S.C. § 5919(g)(2), precludes application of state law. That statute provides:

> If the Secretary makes a payment under paragraph (a) of this subsection [providing for payment by the Secretary should a borrower default], the Secretary shall be subrogated to the rights of the recipient of such payment (and such subrogation shall be expressly set forth in the guarantee or related agreements), including the authority to complete, maintain, operate, lease, *or otherwise dispose of any property acquired pursuant to such guarantee* or related agreements, or any other property of the borrower (of a value

> equal to the amount of such payment) to the extent that the guarantee applies to amounts in excess of the estimated project cost under subsection (c)(2)(B) of this section, *without regard to* the provisions of the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C.A. ¶ 471 *et seq.*] . . . or *any other law*, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property.
> [Emphasis added].

Plaintiff argues that this statute makes state law inapplicable to a foreclosure action, since it states the Secretary may act without regard to "any other law." GPGA argues that the statute is more logically construed as simply defining the Secretary's authority to manage secured property upon the borrower's default, rather than as defining the rights of the parties to the mortgage *vis a vis* each other. The court has found no case law construing this provision. The court finds GPGA's interpretation to be more logical than the government's. The statute refers specifically to property management laws; to infer from the statute that it is intended to preclude application of state foreclosure laws requires that the language "without regard to . . . any other law" be very broadly interpreted.

If section 5919(g)(2) does not specifically preclude application of state foreclosure law, the *Kimbell Foods* factors must be considered. Though the court has found no cases applying the *Kimbell Foods* factors to this particular federal loan guarantee program, there are a number of cases applying those factors to other federal loan guarantee programs. Those cases do not reach consistent results. The primary case upon which Plaintiff relies, *U.S. v. Victory Highway Village, Inc.*, 662 F.2d 488 (8th Cir. 1981), decides a question of remedies available upon default of a federally held or insured loan without mentioning *Kimbell Foods*.

In *Victory Highway Village*, the Eighth Circuit held that Minnesota's redemption statute did not apply to foreclosure of federally held or insured loans under the National Housing Act. The court reasoned that the right to redemption after foreclosure is purely statutory, and that since there is no federal statute granting a right to redemption, that right could not exist. In an earlier opinion, *Victory Highway Village, Inc. v. Weaver*, 634 F.2d 1099, 1101 (8th Cir. 1980), the court discussed *Kimbell Foods*, but found it unnecessary to decide whether federal law or state law governed interpretation of a guarantee under an SBA loan. Another Eighth Circuit case, *U.S. v. Kukowski*, 735 F.2d 1057 (8th Cir. 1984), considered *Kimbell Foods* and held that rights of a guarantor on an SBA loan were to be determined with reference to the Uniform Commercial Code, since when state law is based on a uniform statute, there is little concern that the federal interest in uniformity of law will be hindered by application of state law. In *U.S. v. Missouri Farmers Ass'n, Inc.*, 764 F.2d 488 (8th Cir. 1985), the court determined that FmHA regulations rather than state law governed release of FmHA liens since state law would conflict with the federal interest present in the FmHA loan program. In a case decided before *Kimbell Foods*, *U.S. v. Thompson*, 438 F.2d 254 (8th Cir. 1971), the court held that state law determined priority rights involving a federally insured loan, while federal law determined remedies available to the federal government to enforce its security interest.

Cases from other circuits supporting Plaintiff's position include the following. In *U.S. v. Scholnick*, 606 F.2d 160 (6th Cir. 1979), federal law was applied to determine priority in an action to foreclose a mortgage held by H.U.D. In *U.S. v. Med 0 Farm, Inc.*, 701 F.2d 88 (9th Cir. 1983), a state law barring enforcement of a "due on sale" clause was held not to apply to a loan made by FmHA. In *U.S. v. Stadium Apartments*, 425 F.2d 358 (9th Cir. 1970), state redemption statutes were held not to apply to a mortgage guaranteed by the Federal Housing Authority.

Cases from other circuits supporting GPGA's position include the following. In *U.S. v. Irby*, 618 F.2d 352 (5th Cir. 1980), the court held that state real property law governed an action to recover a deficiency judgment against guarantors under an SBA loan. In *U.S. v. Dismuke*, 616 F.2d 755 (5th Cir. 1980), the government was required to follow state law procedures for judicial confirmation of a foreclosure sale prior to obtaining a deficiency judgment against guarantors on an SBA loan. In *Chicago Title Insurance Co. v. Sherred Village Associates*, 708 F.2d 804 (lst Cir. 1983), the court held that state law governed a question of relative priority of a mechanic's lien and a mortgage insured by H.U.D.

Eighth Circuit precedent would support a ruling that Plaintiff is not required to comply with North Dakota foreclosure law. However, there is no precedent involving this particular loan guarantee program, and the court feels a determination under the *Kimbell Foods* test presents a close question. Since the number of loans guaranteed under this program is apparently small, there is little need for a "nationally uniform body of law." Application of state law might be considered to "frustrate specific objectives of federal programs," if those objectives are considered to include federal operation of the project upon default. Finally, though there may be a strong state interest in "insuring that commercial relationships predicated upon state law are not disrupted," this project is unique and this foreclosure may bear little resemblance to foreclosures of other real property.

If state law were found to apply under the balancing test of *Kimbell Foods*, there is a question of whether GPGA waived its rights under state law by virtue of section 13.03 of the mortgage agreement, which provides:

> To the full extent it may legally do so, Borrower [GPGA] hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage, on behalf of Borrower as well as on behalf of each and

every person acquiring any interest in or title to Mortgaged Property, by, through, or under Borrower, either subsequent to the date hereof, or prior to the date hereof and, Borrower, for itself, and for all that Borrower may legally bind, agrees that when such a sale is held under any decree of foreclosure of this Mortgage, upon consummation of said sale, the sheriff of the county where the real estate which is part of the Mortgaged Property is situated, or other officer who made such sale, or his successor in office, is hereby authorized immediately to execute and deliver to the purchaser at such sale a deed describing and conveying the premises purchased, showing the amount paid therefore, or if purchased by the person in whose favor the order or decree is entered, the amount bid therefor.

Section 13.04 of the Mortgage provides:

> This Mortgage and the rights and obligations hereunder shall be governed by and construed and interpreted in accordance with the federal laws of the United States.

GPGA, citing two early North Dakota cases, *Smith v. Grilk*, 250 N.W. 787 (N.D. 1933), and *Fargo Building & Loan Ass'n v. Rice*, 262 N.W. 345 (N.D. 1935), argues that the right of redemption is sacrosanct under state law, and that the mortgage provision thus is not an effective waiver of the right of redemption. *Fargo Building & Loan Ass'n* held that a mortgagee could lawfully possess the mortgaged property under terms of the mortgage agreement even though the mortgagor may have had a right to the rents and profits from the property. *Smith v. Grilk* was decided shortly after enactment of a redemption statute, and held that the statute was so inconsistent with waiver of the right to redemption, that it repealed recognition of the right to contract for waiver of the right of redemption. The instant case is different from the cases cited: GPGA can hardly have been unaware of the waiver provision when the mortgage was executed, and the terms of this mortgage were *negotiated* among the parties. The court has little sympathy for the waiver argument, given the clear language of the mortgage. Moreover, if federal law governs foreclosure of the mortgage, state law which does not recognize waiver of the right of redemption need not be considered.

Several options are presented to the court. All have merit. These options are:

1. Follow the Eighth Circuit precedents and hold that federal law defines the remedy;

2. Analyze the factual situation under the test set out in *Kimbell Foods*, and hold that under that test state law need not be applied;

3. Hold state law applicable under *Kimbell Foods*, but find that the waiver contained in the mortgage contract is effective and not violative of public policy as the situation is not analogous to a homestead mortgage.

4. Hold that state law is applicable and that statutory notice and right of redemption apply.

The obvious fact that, as a practical matter, a statutory notice and extension of a right of redemption would likely serve no purpose cannot be the basis of decision.

Based upon the contractual provision in the mortgage agreement, particularly 13.03 and 13.04, the unique character of the property and program involved, the court finds that the holding in *U.S. v. Victory Highway Village, Inc.*, and, in addition, the application of the test measurements in *Kimbell Foods* compel a finding that state law is not applicable and that Plaintiffs are entitled to summary judgment for foreclosure.

Turning next to the motion on the second cause of action, the declaratory proceeding, the court finds and concludes that there are no issues of material fact and that the motion for summary judgment is properly before the court.

No dispute exists that the contracts were executed, the plant built, FERC approval obtained, gas produced and tendered, the mortgage obligation defaulted on by the partnership, possession and control of the plant delivered to the trustee, the guarantee

obligation of the United States triggered by the default and notice given by the United States of its "reinstatement" of the gas purchase agreement.

It is not disputed that various representatives of the DOE made statements concerning the possible closure of the plant.

No one disputes that an unbridgeable chasm exists between the economic projections of the contracting parties and the economic realities of 1985, in that supplies appear to have increased and prices declined rather than the opposite.

The defendants Natural Gas Pipeline Co., Tennessee Gas, and Transcontinental Gas in various combinations raise as defenses to the contract the following:

1. That the conduct of the United States precludes the enforcement of the gas purchase agreements, as such conduct creates:

   a) a basis for repudiation under the provisions of U.C.C. 2-609;

   b) a failure of consideration as the government will not "commit" to a 25-year term;

   c) a "frustration of purpose" as the government indicates an intent to not perform for a period of 25 years, and FERC action has weakened the position of the pipeline companies.

2. That the contract was entered into under "mutual mistake" of the contracting parties as to economic conditions.

3. Waiver and Estoppel.

4. The output of production is excessive because higher than anticipated.

The court finds the defenses raised to be without merit.

The United States has succeeded to the contract rights of the "partnership," and has also assumed the duties of the partnership under the contract. No greater or lesser duty is imposed upon the United States than created by the contract upon the partnership.

The court finds the contract, while unusual, to be clear and unambiguous. If gas is produced by the plant, the pipeline companies must pay for all gas produced, without limitation as to quantity, so long as the gas meets the contract specifications and so long as FERC allows the cost to be spread to the customers of the pipeline companies.

The seller of the gas, under the provisions of Article XIX, occupies a somewhat unusual position. It is to this position that the United States has moved. The clear language provides that the seller has the right to cease production *for any reason*, based upon its sole good faith judgment. At the time the contract was prepared and executed, the seller and the buyers had interlocking ownership and control, which to the court negates any claims of overreaching or unconscionability. This position is again reflected in section 5.02 of "Partners Consent and Agreement."

For purposes of this decision, U.C.C. section 2-609 under Illinois law provides no valid defense to the three defendant pipeline companies. If the statements of the DOE officials do provide a basis for seeking reasonable assurance of performance, the response by the DOE goes beyond the obligations imposed upon the United States by the contract language. The defendants cannot claim a repudiation, or an insufficient assurance, as a matter of law when the assurance given assumes a greater burden than the underlying contract. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976) (party may not demand more assurance than that to which it is entitled under the contract); and *Gardner Engineering Corp. v. Page*

*Engineering Corp.*, 484 F.2d 27 (8th Cir. 1973) (party not entitled to receive more assurance than that demanded). *See also Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc.*, 517 F. Supp. 1319 (E.D. La. 1981), in which the district court ruled that a *late and* qualified offer of performance cannot be considered adequate assurance under section 2-609. *Id.* at 1323. We can analogize from *Louisiana Power* that a timely assurance of super-contractual performance is adequate. This court also notes that the provisions of the Uniform Commercial Code are to be broadly interpreted with an eye toward promoting its underlying purposes and policies. *U.C.C. section 1-102(1).* This court declines to adopt the mirror-image approach asserted by the defendants.

A review of the draftsmen's Comments to section 2-609 leads to the conclusion that to give to this section the effect sought by the defendants would be a perversion of the purpose and intent of the law. Its commercial purpose is to allow a buyer or supplier to take steps to guarantee performance where non-performance would create economic loss and alternate solvent suppliers or buyers are available. There is no question that in this case non-performance confers an economic benefit upon the customers of defendant rather than a hardship, and the request for assurance of performance is a subterfuge.

The balance of the matters raised in defense to the motion are without merit.

The change in economic reality as opposed to economic projections may have a bearing upon the wisdom of the contracting parties, but does not render the contract unenforceable. The parties found it desirable to give the seller a list of escape routes, including "any other reason not enumerated hereabove." They also found it desirable, or necessary to satisfy the lender, to limit the options of the buyers, at the expense of their customers. The basic escape route provided buyers is through FERC disapproval. It is

possible that at some future date FERC action may provide an excuse for non-performance, but under the undisputed facts, the United States as successor in interest to the FFB and the "partnership" holds a valid and enforceable contract right.

The court treats this matter as a commercial contract dispute. The request in count 3 for the injunctive relief appears premature. The court will not grant injunctive relief and clothe the plaintiff with the right to invoke the contempt powers of the court without a further showing of necessity.

Plaintiffs have moved for summary judgment of damages due by virtue of non-payment or under-payment by Natural. In ruling in favor of plaintiffs on count 2, the determination of contract rights, the court has found the defendant pipeline companies liable to the plaintiff for the difference between the contract price and the market value price actually paid. As the computation varies and increases each month and the obligation is continuing, the court requests that plaintiff provide the court with its computation of the amounts due from Natural for all gas delivered or tendered through the month of December, 1985. The complaint does not seek a money judgment against other defendants. If objections are made to the computations, an evidentiary hearing will be scheduled thereon. In connection therewith, it is the position of the court that any future action by FERC in prohibiting spreading of contract price gas through to consumers can only operate to excuse performance after the date of such order and not relieve defendants of the duty to make payment for gas tendered or delivered, the costs of which could, at the time of delivery, have been spread through to consumers.

IT IS ORDERED:

The motion of the plaintiffs for summary judgment for foreclosure is *granted*

The motion for summary judgment determining the validity of the Gas Purchase Contract is *granted*

The motion for injunctive relief is *denied*

The motion for money damages judgment is held in abeyance pending submission of current statements of account, as provided above

Dated this 14th day of January, 1986, at Bismarck, North Dakota.

/s/ PATRICK A. CONMY

Patrick A. Conmy, Chief Judge
UNITED STATES DISTRICT COURT

# DISTRICT COURT ORDER AND MEMORANDUM [MAY 8, 1986]

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF NORTH DAKOTA**
**SOUTHWESTERN DIVISION**

UNITED STATES OF AMERICA

and

BERTON ROTH, Delegated to Act as Substitute Trustee for the Department of Energy Under the Mortgage Dated January 15, 1982, with Great Plains Gasification Associates,

Plaintiffs,

vs

GREAT PLAINS GASIFICATION ASSOCIATES, et al.,

Defendants.

A1-85-237

NATURAL GAS PIPELINE COMPANY OF AMERICA,

Third Party Plaintiff,

vs

FEDERAL FINANCING BANK,

Third Party Defendant.

[May 8, 1986]

**ORDER AND MEMORANDUM**

A number of "housekeeping" matters have been and are now before the court. On January 14, 1986, the Court entered summary judgment on several issues. The primary matters left pending were the respective liabilities of the defendants for gas purchases.

The court is advised that the parties have resolved between themselves most of the dollar disputes and that, after payments in excess of $40,000,000.00, only a dispute regarding some computation and interest problems remain unresolved. This dispute apparently involves some factual issues, and may not be ripe for summary disposition. It is ironical that in comparison to the other sums involved it seems almost de minimis although in excess of $300,000.00.

The court is further advised that the parties will in the near future present a proposed order for certification of issues on appeal to the Eighth Circuit, making it possible for the appeal to move forward without resolution of the dispute involving the final dollar amounts.

Recently, the court has ordered amendments to clarify the respective liability of the partners on the foreclosure, to make the complaint conform to the evidence regarding the individual defendants' liabilities, and to correct the legal descriptions of the properties described in the Order of Foreclosure.

These various motions, orders and stipulations leave unresolved only the application of the Partnership for a delay in the Marshal's sale on foreclosure. This sale is presently scheduled for May 28, 1986.

In the Order of Summary Judgment this court determined that the redemption period set out in state law was not applicable, and that the foreclosure was governed by federal "common law." The Partnership has now applied for a six month delay in the sale, urging the court to establish such as an "equitable redemption period."

The defendants urge that, as a matter of practical consideration:

1. the plant is paying its expenses through operations;

2. the individual defendants are paying for the gas produced;

3. the parties are "hoping" to reach some negotiated agreement which can be termed a "redemption", revesting title to the plant in the Partnership or in some new combination of partners;

4. that several hundred millions of dollars of investment credits may be usable as an inducement or selling point to prospective purchasers; and

5. these investment credits will be lost as a selling point if the marshal's sale is held.

The State of North Dakota, as intervenor, has urged the granting of such a stay, pointing out the economic impact of a closing of the plant, and urging that the best interests of all are served by exhausting all possible "sales" of the plant as an operating entity.

Counsel for various defendants have indicated that the plaintiff has declined to negotiate any "sale" until title is vested in plaintiff or some other purchaser at the marshal's sale.

Plaintiff resists the requested delay, pointing out:

a. the doctrine of "equitable redemption" simply would allow the "Partnership" to pay the amount due at any time prior to the Marshal's sale, which would revest title to the plant in the Partnership.

b. If the Partnership would tender the sum due, some 1.5 billion dollars, the plaintiff would with great joy satisfy the mortgage, dismiss the foreclosure, etc., and rank the event as one of the most memorable occurrences of the twentieth century.

c. that investment credits may well already have been recaptured by the transactions to date.

d. that the court really has no power or authority to grant the requested delay.

e. that the time has come to get this over with and get on with other business.

The court frankly admits its desire to reach a reasonable accommodation for the defendants. The options available to the Partnership appear to be:

1. obtain a "delay" in the sale and attempt to put together some "redemption" package using the investment credits, for whatever value they may have, as an inducement to others to participate;

2. appeal, and in connection with such appeal, attempt to obtain a "stay" of the foreclosure sale, in theory still attempting to negotiate a "redemption";

3. accept the consequences of the sale (if any) and attempt to purchase the plant from the Government after title has vested in the government.

The interests of the Government would appear to be to realize as much as possible, as soon as possible, on its investment in the plant.

Defendants rely on a theory of "equitable redemption", arguing that this equitable theory permits the court to delay the foreclosure sale, theoretically indefinitely, in the interests of equity and substantial justice.

In *United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 498 (8th Cir. 1981), the Eighth Circuit ruled that in federal foreclosure actions, no statutory right of redemption exists after foreclosure. *Id.* The court continued:

> Therefore, the debtor's protection in this case is embodied in the common law doctrine of equity of redemption, applied in every jurisdiction, that permits the debtor, after default but prior to foreclosure, to perform his entire obligation under the mortgage and have title to his property restored free and clear of the mortgage. In the absence of an applicable statute extending the time, the equity of redemption is terminated by foreclosure and sale.

*Id.* Section 511, 55 Am.Jur.2d Mortgages, states:

> The right to redeem is a favorite equity and will not be taken away except upon a strict compliance with the steps necessary to divest it. Thus, in respect of forfeiture clauses sometimes inserted in mortgages, it may be said that since relief in equity against forfeitures is based on the doctrine that the possessor of a legal right shall not be allowed to use it to work oppression or injustice, whenever a mortgagor can bring himself within this principle it is the duty of the court to administer proper relief if it can do so without injustice to others. This does not, however, permit the assertion of an equity of redemption against a stronger equity, or, in general, in any case where its assertion would be plainly inequitable.

55 Am.Jur.2d Mortgages § 511, at 503 (1971).

Defendants rely on *United States v. Curry*, 561 F.Supp. 429 (D.Kan. 1983), for the proposition that this court has the authority to grant defendants an equitable redemption period, even though an Order of Foreclosure has been entered. In *Curry*, defendants were admittedly in default on their FmHA loans. The district court ruled that the state redemption period was not applicable to a federal foreclosure, but that Kansas law permitted granting an equitable period of redemption even after the foreclosure sale. *Id.* at 431.

The *Curry* court relied on a Kansas Court of Appeals decision, *First Federal Savings & Loan Association v. McKain*, 617 P.2d 583 (Kan.App. 1980), in which the court ruled that it had the authority to *extend* the *statutory* period of redemption upon a showing of equitable grounds and in the exercise of judicial discretion. 617 P.2d at 585.

In *United States v. Montgomery* the District Court for the District of Kansas held that defendants were entitled to a sixty day equitable period of redemption, commencing from the date of sale. *United States v. Montgomery*, 268 F.Supp. 787, 790

(D.Kan. 1967). The court deemed it too harsh and inflexible a rule that, because Congress had not specifically provided for a right of redemption, no such right existed. *Id.* (disagreeing with *United States v. Heasley*, 283 F.2d 422, 427 (8th Cir. 1960)).

None of these cases persuade this court that it has the authority to grant an equitable period of redemption that begins after marshal's sale and before issuance of a marshal's deed. It appears to the court that the great weight of authority, at least in this Circuit, is that no equitable right of redemption exists after foreclosure sale. This rule is consistent with the goal of a uniform federal law, and the judicial policy of protecting the treasury and promoting the security of the federal investment. *See United States v. Stadium Apartments, Inc.*, 425 F.2d 358, 364 (8th Cir. 1970). This court is loath to depart from the well established rule without significant authority to support its decision.

The court finally notes that the defendants talk of "redemption", but it is apparent that "re-negotiation" would be a more accurate description.

One issue remains: whether amending the property descriptions contained in the Order and Decree of Foreclosure requires that notice of the marshal's sale be republished, such that the marshal's sale must be postponed.

> Section 2410, 28 United States Code, provides:
>
> (c) A judgment or decree in [an] action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. . . . In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where the property is sold to

> satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

28 U.S.C.S. § 2410 (1977). This provision makes no mention of procedures to be followed in conducting a judicial sale. Section 2002, United States Code, states, however:

> A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated. . . . The notice shall be substantially in such form and contain such description of the property by reference or otherwise as the court approves. The court may direct that the publication be made in other newspapers.

28 U.S.C.S. § 2002 (1977). Case law indicates, with regard to accomplished sales, that the property's description need not have been correct in minute detail as long as the information given was sufficient to inform the public of the property offered for sale. *United States v. O'Connell*, 496 F.2d 1329, 1333 n.1 (2d Cir. 1974); *Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp.*, 172 F.2d 416, 422 (10th Cir. 1949), *cert. denied*, 338 U.S. 814, 70 S.Ct. 54. This court has not found, however, case law dealing with situations where the court discovers errors in description *prior to the sale*. This court believes that the safest and best course in this situation is to re-publish the notice of sale, with a corrected property description. This procedure guarantees the protection of all parties concerned.

Based on the foregoing, it is the ORDER of this court that:

1. DEFENDANTS' MOTION FOR AN ORDER PERMITTING AN EQUITABLE REDEMPTION PERIOD IS DENIED.

2. THE JUDICIAL SALE PURSUANT TO FORECLOSURE IS POSTPONED UNTIL JUNE 30, 1986. THE MARSHAL IS DIRECTED TO REPUBLISH THE NOTICE OF PUBLIC SALE, USING THE AMENDED PROPERTY DESCRIPTION SET OUT IN THE ORDER AMENDING THE ORDER AND DECREE OF FORECLOSURE AND SALE SIGNED TODAY.

3. THE STATE OF NORTH DAKOTA'S MOTION FOR HEARING IS DENIED.

Dated this 8th day of May, 1986.

/s/ PATRICK A. CONMY

Patrick A. Conmy, Chief Judge
UNITED STATES DISTRICT COURT

# DISTRICT COURT JUDGMENT
## [JUNE 30, 1986]

# United States District Court

DISTRICT OF
NORTH DAKOTA—SOUTHWESTERN DIVISION

United States of America, et al.,

v.

Great Plains Gasification Associates, et al.,

FINAL JUDGMENT IN A CIVIL CASE

CASE NUMBER: A1-85-237

**Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to the Memorandum and Order entered on June 30, 1986 and the Order and Memorandum entered on May 8, 1986 that North Dakota State Law of Foreclosure does not apply to this case and that this court has no authority to grant an equitable period of redemption.

EDWARD J. KLECKER, CLERK

/s/ DEBORAH THOMASON

(By) Deputy Clerk

Date: June 30, 1986

Supreme Court, U.S.
FILED
OCT 14 1987
JOSEPH F. SPANIOL, JR.

(2)

No. 87-92

# In the Supreme Court of the United States

OCTOBER TERM, 1987

ANR GASIFICATION PROPERTIES COMPANY, ETC.,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

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No. 87-92

ANR GASIFICATION PROPERTIES COMPANY, ETC.,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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Petitioner contends that the North Dakota redemption statute applies to the foreclosure in this case.

1. Petitioner is one of five general partners in Great Plains Gasification Associates (Great Plains). The partnership was formed for the purpose of constructing, owning, and operating the Great Plains Coal Gasification Plant (Project) in Mercer County, North Dakota, which converts lignite coal into synthetic natural gas (Pet. App. 3A).

The Project was financed in large part by a loan of approximately $1.5 billion, secured by a mortgage on virtually all partnership assets from the Federal Financing Bank (Pet. App. 3A). Section 13.04 of the individually negotiated mortgage agreement provides that the rights and obligations of the parties to the mortgage are to be governed by federal law, and Section 13.03 states that " '[t]o the full extent it may legally do so, Borrower hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage * * *' " (Pet. App. 3A, 24A; C.A. App. 118-119). The

Department of Energy (DOE) guaranteed the loan pursuant to the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (& Supp. III) 5901 *et seq.* (the Act).[1]

Simultaneously with the signing of the mortgage and loan guarantee agreement, four gas pipeline companies, affiliates of the Great Plains partners, entered into separate long-term Gas Purchase Agreements with Great Plains, in which they agreed to take or pay for the synthetic gas produced from the Project (Pet. App. 13A). Each agreement provided that, upon Great Plains' default, the trustee under the mortgage would have the right to succeed to Great Plains' rights under the agreement (C.A. App. 164). The pipelines also entered into agreements directly with DOE, in which they agreed that if Great Plains defaulted, DOE could notify them under the Gas Purchase Agreements and reinstate those agreements with the pipelines (C.A. App. 169-173).

On August 1, 1985, Great Plains defaulted on its payment obligation, and DOE took over the Project (Pet. App. 4A).[2] DOE directed the Project administrator to continue operating the plant, and advised the pipelines that it was substituting the Secretary of Energy for Great Plains as the seller in the Gas Purchase Agreements (*id.* at 16A).

On October 9, 1985, the loan was accelerated and DOE paid the Federal Financing Bank the entire amount due, thereby becoming subrogated to the bank's rights against Great Plains (Pet. App. 4A).

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[1] The loan guarantee agreement, like the mortgage, expressly states that the parties' rights and obligations are to be determined in accordance with federal law (C.A. App. 84).

[2] Originally, Great Plains' $70,338,753.90 interest payment and $328,500,000 principal payment were due June 30, 1985, but the due date was extended until August 1, 1985 (Pet. App. 4A).

2. Respondents filed suit against petitioners in the United States District Court for the District of North Dakota seeking, inter alia, foreclosure of the mortgage, and moved for summary judgment. In an order dated January 14, 1986, the district court granted respondents summary judgment on the foreclosure count (Pet. App. 30A). The district court held inapplicable the North Dakota state law that provides a one-year post-foreclosure redemption period, during which the debtor is entitled to the "possession, rents, use, and benefits" of the foreclosed property (N.D. Cent. Code §§ 28-24-11, 32-19-18 (1974 & 1976)). The court applied the balancing test formulated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979),[3] and concluded that, particularly in light of the express provisions of the mortgage agreement, state law was inapplicable (Pet. App. 23A-25A).

On June 30, 1986, the property was sold to the sole bidder, the United States, for $1 billion (Pet. App. 4A).[4]

3. The court of appeals affirmed the decision of the district court on different grounds.[5] Concluding that the Act provides "sufficient direction for a decision in this case," the appellate court found the *Kimbell Foods* balancing test inapplicable (Pet. App. 5A). The court noted that although redemption was not specifically mentioned in the Act, "Congress presupposed default and delineated the

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[3] The factors in that balancing test are (1) the federal program's need for a nationally uniform body of law, (2) whether the program's objectives would be frustrated by application of a state law, and (3) whether state commercial practice would be disrupted unfairly if a federal rule is applied (440 U.S. at 728-729).

[4] Prior to the foreclosure sale, the court denied Great Plains' motion, based on an asserted "equitable right of redemption," to amend the court's order to defer the sale for six months (Pet. App. 32A-39A).

[5] The court of appeals also affirmed, in a separate appeal, the district court's decision upholding the validity and enforceability of the Gas Purchase Agreement. See 819 F.2d 831 (1987).

DOE s rights in the event of default" (*id.* at 6A).[6] It then found that "[w]hereas under North Dakota law Great Plains, as debtor, would have certain superior rights to the property upon default, so the DOE under the Act, has rights to the property which are superior to all others" (*id.* at 7A).

4. The court of appeals' decision interpreting this little-utilized statute[7] is correct and does not conflict with

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[6] 42 U.S.C. 5919(g) provides in pertinent part:

> (1) If there is a default by the borrower * * * [the lender] shall have the right to demand payment of the unpaid amount from the Secretary. * * *
>
> (2) If the Secretary makes a payment under paragraph (1) of this subsection, the Secretary shall be subrogated to the rights of the [lender] * * * including the authority to complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements, * * * without regard to the provisions of the Federal Property and Administrative Services Act of 1949, * * * or any other law, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property.
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> * * * * *
>
> (4) * * * The guarantee agreement shall include such detailed terms and conditions as the Secretary deems appropriate to protect the interests of the United States in the case of default and to have available all the patents and technology necessary for any person selected, including, but not limited to the Secretary, to complete and operate the defaulting project. * * *

[7] The district court observed (Pet. App. 23A) that "the number of loans guaranteed under this program is apparently small," and petitioner itself recognizes that the case involves a "first-of-its-kind joint endeavor between government and private industry" (Pet. 17). There is no present prospect of any future such endeavors under this Act.

any decision of this Court or of any other court of appeals. It presents no issue warranting further review.

a. Petitioner contends (Pet. 15) that the court of appeals' decision is inconsistent with *United States* v. *Kimbell Foods, Inc., supra.* This contention is incorrect. In *Kimbell Foods,* the Court reaffirmed that "federal law governs questions involving the rights of the United States arising under nationwide federal programs" (440 U.S. at 726). Determining the content of that law depends on the particular program involved. When Congress has specified the rule to be followed, the inquiry is at an end—the statute must be applied. Only "absent a congressional directive," should courts engage in a balancing test to determine the applicability of state law. 440 U.S. at 740.

Applying these principles, the Court in *Kimbell Foods* found that no federal statute established priorities for contractual liens arising from certain loan programs administered by the Small Business Administration and the Farmers Home Administration (440 U.S. at 718, 727). In that situation, the Court found it necessary to formulate a balancing test, the application of which led to the conclusion that the content of the federal common law with regard to the priority of the liens under the lending programs there involved should be determined by reference to state law.

Plainly, the decision below does not conflict with *Kimbell Foods.* The court of appeals here had to determine the content of the governing federal law with respect to the question at issue in this case—the redemptive rights of a debtor who has defaulted on a loan guaranteed pursuant to the Federal Nonnuelear Energy Research and Development Act of 1974. As the court of appeals recognized, that Act does provide the clear "congressional directive" that was lacking in the statutes at issue in *Kimbell Foods.* The Act specifically provides that if the borrower defaults, and the DOE makes payment under its guarantee, it shall the authority to "complete, maintain,

operate, lease, or otherwise dispose of any [Project] property * * * without regard to * * * [40 U.S.C. 471 et seq.] * * * or any other law" (42 U.S.C. 5919(g)(2)), thus precluding the application of state-law-based limitations on DOE's authority. The Act also mandates that the rights of DOE shall be "superior to the rights of any other person" (42 U.S.C. 5919(g)(2)), rendering DOE's rights in a defaulted project under the Act superior to those of anyone else, including petitioner's asserted right to redemption under state law.[8] Finally, the Act expressly directs the DOE to include in the guarantee agreement "detailed terms and conditions * * * to protect the interests of the United States in the case of default." 42 U.S.C. 5919(g)(4). DOE carried out this statutory mandate by providing in the loan documents that federal law would apply and that the borrower waived any state law redemption rights.[9] In light of the clear congressional

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[8] Petitioner suggests (Pet. 14) that the statutory reference to the rights of any "other person" refers only to other creditors. That restricted reading is inconsistent with the plain statutory language. If Congress had intended to refer to other creditors, it could easily have done so. The district court's reluctance (Pet. App. 21A) to construe the reference to "any other law" as including state law similarly ignores the plain statutory language. Neither petitioner nor the district court refers to anything in the legislative history of this statute that casts any doubt on the plain meaning of either of these statutory terms. The post-enactment testimony of one federal official that petitioner refers to (Pet. 7) is, of course, inconsistent with the position the government has taken in this litigation and with the decision of the court of appeals.

[9] Petitioner's assertion (Pet. 3) that the availability under state law of a one-year post-foreclosure redemption period was a "premise" of the Project is inconsistent with these express contractual provisons. Petitioner's related suggestions (Pet. 7) that its contractual waiver was either "boiler plate" or ineffective are not persuasive. The mortgage at issue here was plainly not a standard form contract. Rather, it was carefully negotiated specifically for this multi-billion dollar project. See Pet. App. 24A. In any event, the purpose of the redemption

directive and DOE's compliance with that directive, the court of appeals correctly followed the decisional procedure established by *Kimbell Foods* and found state law was inapplicable.

b. Petitioner also contends (Pet. 16-17) that the court of appeals' decision conflicts with decisions of the First, Third, Seventh and Ninth Circuits construing quite different federal statutes established to protect large numbers of small borrowers and depositors.[10] Although in those cases the courts have refused to displace state law in the absence of an explicit congressional directive, there is at most a semantic disagreement with this case. Here, there are clear congressional directives that are inconsistent with application of the state law upon which petitioner relies.[11]

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period is to give the borrower the opportunity to reclaim the property if he pays the purchase price plus interest (N.D. Cent. Code § 28-24-02 (1974)). Petitioner has never suggested that it could pay DOE any sum remotely approaching the $1 billion purchase price. See Pet. App. 37A ("the defendants talk of 'redemption,' but it is apparent that 'renegotiation' would be a more accurate description"). Indeed, petitioner's proposals for restructuring the Project have never adequately recognized DOE's investment in the project. See Plaintiffs-Appellees' C.A. Addendum 31, 44. In its brief in the court of appeals, petitioner expressed concern about possible adverse tax consequences of the timing of the sale of the Project upon foreclosure in the absence of redemptive rights (see ANR Appellant's Br. 16 & n.*), but that concern is of course irrelevant to the legal issue here.

[10] See *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 708 F.2d 804 (1st Cir. 1983) (Housing and Urban Development mortgage insurance); *United States* v. *Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3d Cir. 1986) (Farmers Home Administration loan); *United States* v. *Ellis*, 714 F.2d 953 (9th Cir. 1983) (same); *Federal Deposit Insurance Corp.* v. *Braemoor Associates*, 686 F.2d 550 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983) (Federal Deposit Insurance Act suit to recover bank assets); *United States* v. *Pastos*, 781 F.2d 747 (9th Cir. 1986) (Small Business Administration mortgage).

[11] Petitioner's claim (Pet. 15) that there is no inconsistency is incorrect. The Act expressly gives DOE the right, upon a default and pay-

Thus, there is no reason to believe that any other court would have reached a different result in this case than that reached by the Eighth Circuit here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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ment by DOE under the Loan Guarantee Agreement, to operate the Project or to dispose of it as it sees fit. The application of state redemption laws would defeat DOE's right to immediate possession and delay its ability to recoup its investment during the redemption period; such laws would make it difficult, if not impossible, to sell the Project before the right of redemption expired.

Contrary to petitioner's suggestion (Pet. 15), the court of appeals here did not recognize the existence of any right to redemption after default but before foreclosure. Instead, the court held (Pet. App. 8A) that there is no post-foreclosure right to redemption, and that the determination whether or not to grant a post-default period for redemption lies wholly within the district court's discretion—and thus that there is no post-default "right" to redemption. Indeed, the court of appeals upheld the district court's decision not to grant such a redemption period here. Accordingly, nothing in the court's discussion is inconsistent with its conclusion that the federal statutory scheme precludes the existence of a state-granted right to a post-foreclosure redemption period.

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